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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
3 -----x

4 EDMIN ALICEA,

5 Plaintiff,

6 v.

13 Civ. 7073 (JGK)

7 THE CITY OF NEW YORK, et al.,,

8 Defendants.

9 -----x  
10 New York, N.Y.  
11 July 12, 2016  
12 5:41 p.m.

13 Before:

14 HON. JOHN G. KOELTL,

15 District Judge

16 APPEARANCES

17 REIBMAN & WEINER  
18 Attorneys for Plaintiff  
19 BY: JAMES SANBORN  
20 MARC REIBMAN

21 NEW YORK CITY LAW DEPARTMENT  
22 Attorneys for Defendants  
23 BY: ELISSA P. FUDIM

24  
25

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1 (Case called)

2 MR. SANBORN: James Sanborn and Marc Reibman for the  
3 plaintiff.

4 MS. FUDIM: Elissa Fudim for the Office of Corporation  
5 Counsel for the defendant. Good afternoon.

6 THE COURT: Good afternoon. This is the final  
7 pretrial conference.

8 Let me begin with the motions in limine. First, the  
9 plaintiff's motions in limine. First, the plaintiff moves to  
10 preclude the defendants from cross examining him on the fact  
11 that he was convicted of armed robbery in 1999 and was released  
12 from custody in August 2007. Pursuant to Federal Rule of  
13 Evidence 609(a)(1), evidence of such a felony conviction must  
14 be admitted in a civil case such as this, subject to Rule 403.  
15 The relevant considerations under Rule 403 do not argue for  
16 exclusion, but rather favor admission because the probative  
17 value of the evidence is not substantially outweighed by the  
18 danger of unfair prejudice.

19 The impeachment value of the prior conviction is high  
20 because the serious nature of the felony detracts from the  
21 plaintiff's credibility, and the plaintiff concedes that this  
22 factor weighs in favor of admission. The remoteness of the  
23 conviction is somewhat neutral because the actual offense was  
24 committed more than ten years ago, but the plaintiff was  
25 released well within the ten-year provision provided by

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1 Rule 609(b), which reverses the rule of admissibility found in  
2 Rule 609(a). The prior conviction is not similar to the crime  
3 for which the plaintiff was arrested in this case and this  
4 factor, as the plaintiff concedes, weighs in favor of  
5 admissibility. The jury is unlikely to infer that simply  
6 because the plaintiff committed an armed robbery in 1999, he is  
7 likely to have committed a drug offense for which he was  
8 arrested in this case.

9 Finally, the plaintiff argues that the plaintiff's  
10 credibility will not be at issue in this case because Lindsay  
11 Daniels will be testifying about the plaintiff's injuries. But  
12 only the plaintiff can offer evidence with respect to his  
13 allegations concerning his encounter with the defendants,  
14 whether he swallowed marijuana and whether the plaintiff was  
15 subjected to excessive force. The fourth factor favors  
16 admission of the conviction because the plaintiff's credibility  
17 will be important during the trial.

18 Therefore, the probative value of the prior conviction  
19 is not substantially outweighed by the danger of unfair  
20 prejudice, confusion or the other 403 factors. See United  
21 States v. White, No. 08-CR-0862, 2009 WL 4730234, at \*3-\*4,  
22 (E.D.N.Y. December 4, 2009).

23 The plaintiff asks that if the prior conviction is  
24 used, it be limited to the name, date, and disposition of the  
25 prior conviction. That is a reasonable request. The details

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1 of the prior conviction are unnecessary for its impeachment  
2 purpose. See United States v. Brown, 606 F. Supp. 2d 317-18  
3 (E.D.N.Y. 2009); see also United States v. Estrada, 430 F.3d  
4 606, 616 (2d Cir. 2005).

5 Second, the plaintiff seeks to preclude the defendants  
6 from introducing his rap sheet or numerous prior instances of  
7 arrests for marijuana offenses. The defendants respond that  
8 this information would be relevant if the plaintiff pursues a  
9 claim of mental and emotional distress. The defendants are  
10 correct that if the defendant attempts to seek damages based on  
11 testimony that he was emotionally traumatized by his arrest,  
12 then the defendants should be permitted to introduce evidence  
13 that this was not an unusual or traumatizing event for the  
14 plaintiff. On the other hand, if the plaintiff limits his  
15 testimony to the physical pain that he allegedly suffered from  
16 the excessive force, then the prior arrests should not be  
17 relevant. There is nothing about the prior arrest that would  
18 lessen the pain of excessive force. See Banushi v. Palmer,  
19 08-CV-2937, 2011 WL 13894, at \*3 (E.D.N.Y. January 4, 2011),  
20 aff'd 500 F. App'x 84 (2d Cir. 2012); see also Jackson v. City  
21 of White Plains, 05-CV-0491, 2016 WL 234855, at \*4 (S.D.N.Y.  
22 January 19, 2016).

23 The court notes that the third amended complaint that  
24 the plaintiff filed eliminates a claim for mental and emotional  
25 distress. Therefore, the defendants are precluded from

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1 introducing the plaintiff's rap sheet or examining the  
2 plaintiff on any convictions or arrests other than the 1999  
3 armed robbery conviction, unless the plaintiff opens the door  
4 to such additional arrests by testifying about the unusual or  
5 traumatizing effect of the circumstances of the arrest or  
6 alleged malicious prosecution in this case.

7 Before attempting to introduce the prior arrests or  
8 the rap sheet, the defendants should, of course, raise the  
9 issue with the court outside the presence of the jury.

10 We then have the fact that there was a third amended  
11 complaint that was filed, a new motion in limine by the  
12 plaintiff to preclude the defendant from attempting to impeach  
13 the plaintiff with the statements from the second amended  
14 complaint as to the names of the police officers who subjected  
15 the plaintiff to excessive force.

16 Now, I have a couple of questions. The motion in  
17 limine said that the plaintiff was filing the third amended  
18 complaint with the consent of the defendants, is that correct?

19 MR. SANBORN: Yes, except for when I initially filed,  
20 I did not include as an exhibit the written consent e-mail. I  
21 refiled that before this hearing with the exhibit.

22 THE COURT: The defendants have seen the third amended  
23 complaint and consent to the filing of the third amended  
24 complaint?

25 MS. FUDIM: We consent to the filing of the third

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1 amended complaint, yes. But I don't want that to in any way  
2 imply that we in any way consent to the relief being sought in  
3 the motion.

4 THE COURT: No. Sure, I understand that.

5 MS. FUDIM: There are distinct issues.

6 THE COURT: It's a different issue.

7 So the plaintiff has filed a third amended complaint  
8 and the defendant should answer the third amended complaint by  
9 this Friday, right?

10 MS. FUDIM: OK.

11 THE COURT: I assume the answer is going to be very  
12 similar to the answer to the second amended complaint, right?

13 MS. FUDIM: That's my understanding, yes. To be  
14 totally candid, I did not review his third amended complaint.  
15 He represented in an e-mail to me the changes. I take him at  
16 his word that those are, in fact, the changes he put in there  
17 and gave my consent. Assuming those are what he represented to  
18 me, it shouldn't take long.

19 THE COURT: I think there is another change in there,  
20 actually. My understanding of the testimony so far had been  
21 that there was the alleged excessive force used on the occasion  
22 of the arrest which is now alleged by Officer Arico, right,  
23 with the other two officers standing by, right?

24 MR. SANBORN: Yes.

25 THE COURT: The other alleged use of excessive force

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1 was excessive force in the parking lot outside the precinct,  
2 yes?

3 MR. SANBORN: Correct. That was the plaintiff's  
4 testimony, yes.

5 THE COURT: Right. The third amended complaint  
6 alleges a rough ride without a seatbelt, which at least to me  
7 was news.

8 MR. SANBORN: I can address that, your Honor. The  
9 rough ride allegation is in the second amended complaint.  
10 That's not a new allegation.

11 THE COURT: OK, fine. The allegation about what  
12 happened outside the precinct is not there in the third amended  
13 complaint.

14 MR. SANBORN: It is in the third amended complaint.  
15 What I did, your Honor, was I filed the second amended  
16 complaint, which has multiple instances of the pulling of the  
17 handcuffs behind the back. The second amended complaint did  
18 not break down the sequence of, once on the sidewalk, once on  
19 the way to the precinct, so I just kept it the same to try not  
20 to make too many changes to the pleading.

21 THE COURT: OK, fine. Thank you.

22 MR. SANBORN: Thank you.

23 THE COURT: They'll be an answer by Friday to the  
24 third amended complaint.

25 Now, we come up to the plaintiff's new motion in

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1 limine, which is to prevent the plaintiff from being impeached  
2 with the statements from the second amended complaint on the  
3 grounds that they are -- the probative value outweighed by the  
4 danger of confusion.

5 The defendant opposes that motion?

6 MS. FUDIM: Yes, your Honor.

7 As an initial matter, I mean, I can certainly speak  
8 off the cuff as to the basis for why I would oppose that. In  
9 terms of actually doing legal research and having cases, I  
10 haven't had that opportunity yet. This was filed yesterday  
11 when I was in -- I had depositions yesterday and today I was in  
12 court on other matters. I have not had the opportunity to  
13 really sit down and parse it out.

14 My gut reaction to that is allegations made in the  
15 complaint are judicial admissions. I am not sure you can just  
16 withdraw judicial admissions. I mean, the entire length of  
17 discovery or a large portion of the length of discovery,  
18 defendants were operating under the notion that the person who  
19 committed these acts was Officer Rivas, as noted in the  
20 complaint.

21 The fact that the plaintiff is now changing his story  
22 and saying, well, no, it is Mr. Arico, does ring untrue to us.  
23 We know they're saying he always described the perpetrator of  
24 the conduct as a stocky man with spiky hair. As the court  
25 will see when these individuals come into court, Mr. Rivas is

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1 probably five five, five six, Hispanic male. Mr. Arico is  
2 probably six one, six two, white male.

3 So, the notion that these two individuals are somehow  
4 interchangeable, I think there is a credibility issue that all  
5 of a sudden, after the depositions take place, after, at a  
6 minimum, plaintiff's counsel is able to see that there is a  
7 large height disparity between these gentlemen, all of a sudden  
8 the allegation as to who did what changes. And I think that  
9 that is something that, notwithstanding the amendment, that  
10 defendants should be entitled to cross-examine the plaintiff  
11 about.

12 Now, if he has an explanation as to, you know, I  
13 always testified one thing and whatever the explanation is, I  
14 mean, I think that that really goes to weight and not  
15 admissibility. The plaintiff filed a lawsuit, they filed  
16 two -- there was actually a complaint and an amended complaint  
17 and a second amended complaint where we got to the third  
18 amended complaint. Now, on the eve of trial, they want to  
19 withdraw these prior allegations.

20 My gut reaction is that you can't just withdraw a  
21 judicial admission like that. As I said, I would appreciate  
22 time to do some more research into this. As I said, I didn't  
23 have that opportunity.

24 THE COURT: It is not necessary. I am prepared to  
25 rule. I have read the motion and there really isn't a lot in

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1 dispute. I am prepared to rule.

2 The plaintiff concedes correctly that the second  
3 amended complaint is a prior statement by the plaintiff or a  
4 representative of the plaintiff and is, therefore, admissible  
5 under Federal Rule of Evidence 801 as non-hearsay. See e.g.  
6 Dweck v. Pacificorp Capital, Inc., No. 91-CV-2095, 1998 WL  
7 88742, at \*7 (S.D.N.Y. March 2, 1998) ("It is well-established  
8 in the Second Circuit that superseded pleadings, while not  
9 judicial admissions, *per se*, may be introduced as evidence and  
10 considered an admission."); see also Rosenberg v. Curry  
11 Chevrolet Sales & Service, Inc., 152 F.3d 920 (2d Cir. 1998)  
12 (summary order).

13 The statements are plainly relevant to the allegations  
14 in the case. The plaintiff argues, however, that the  
15 statements should be excluded under Federal Rule of Evidence  
16 403 because they are unfairly confusing given their innocent  
17 explanation.

18 However, everything that the plaintiff says in  
19 explanation can be explained to the jury. At the very least,  
20 the statements in the second amended complaint can be used to  
21 argue that the plaintiff was careless with the truth or the  
22 facts and was prepared to level what turned out to be untrue  
23 allegations against at least one individual police officer.  
24 The plaintiff sued a police officer with charges of excessive  
25 force when the plaintiff concedes that those allegations

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1 against the police officer were untrue. The plaintiff could  
2 have sued the officer as a John Doe defendant with a physical  
3 description, but chose not to do so. The plaintiff can make  
4 his explanations to the jury as to why he was mistaken in his  
5 earlier charge, but that does not mean that the defendant  
6 should be precluded from using the allegations to attempt to  
7 impeach the plaintiff's credibility. The defendants can use  
8 the allegations from the plaintiff's earlier complaint to  
9 attempt to impeach the plaintiff, and the plaintiff can use the  
10 explanations that the defense counsel proffers now to explain  
11 why the conceivably incorrect statements were made in the  
12 earlier complaint. The probative value of the false  
13 allegations is not substantially outweighed by the danger of  
14 unfair prejudice or confusion.

15 The motion in limine is denied.

16 That takes us to the defendant's motions in limine.

17 1. The defendants move to preclude the plaintiff's  
18 attorneys from referring to the defense attorneys as "City  
19 attorneys." The plaintiff's attorneys disclaim any desire to  
20 refer to defense counsel as City attorneys and the motion is  
21 therefore moot. The court notes that it will be necessary in  
22 the voir dire to explain that the defendants are represented by  
23 Zachary W. Carter, the Corporation Counsel of the City of New  
24 York, and by Elissa P. Fudim and Barry Myrvold from that  
25 office.

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1                   2. The defendants seek to preclude any evidence of  
2 indemnification for the individual defendants. The plaintiff  
3 agrees and the motion is therefore moot.

4                   3. The defendants seek to preclude the plaintiffs  
5 from suggesting a specific dollar amount of damages to the  
6 jury. While the decision whether to allow reference to a  
7 dollar amount is left to the sound discretion of the district  
8 court, district courts are encouraged not to allow such  
9 references and the court agrees that precluding the reference  
10 to a dollar amount is, in fact, the better approach; see  
11 Consorti v. Armstrong World Industries, Inc., 72 F.3d 1003,  
12 1016 (2d Cir. 1995) (encouraging trial judges to prohibit  
13 counsel from suggesting specific monetary awards for pain and  
14 suffering), vacated on other grounds, 518 U.S. 1031 (1996);  
15 Phillips v. City of New York, 871 F.Supp.2d 200, 208 (E.D.N.Y.  
16 2012). Accordingly, the defendants' motion is granted.

17                  4. The defendants argue that the plaintiff should not  
18 be permitted to examine the individual defendants on their  
19 prior disciplinary history because that history is not  
20 admissible under Federal Rule of Evidence 404(b). The  
21 plaintiff responds that he is not attempting to introduce the  
22 specific instances of misconduct under Federal Rule of Evidence  
23 404(b) and therefore the motion is misguided. Rather, the  
24 plaintiff alleges that specific instances of misconduct can be  
25 used for impeachment under Federal Rule of Evidence 608(b) so

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1 long as they are probative of untruthfulness. The plaintiff  
2 has not detailed the specific instances, but offers to do so at  
3 trial before cross examination. It is plain that some  
4 instances in a disciplinary record may be probative of  
5 untruthfulness, such as prior instances of lying. However, the  
6 usefulness of Rule 608(b) is somewhat limited because the rule  
7 allows examination into the prior instances, but does not allow  
8 extrinsic evidence to prove those instances. See United  
9 States v. Nelson, 365 F.Supp.2d 381, 386 (S.D.N.Y. 2005); Jack  
10 B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence  
11 Section 608.22[1] (2d ed. 1997). Moreover, although the  
12 misconduct may be admissible, disciplinary findings would not  
13 be allowed because they would violate the rule against  
14 extrinsic evidence and would involve the hearsay conclusions of  
15 a third party. See 2003 Advisory Committee Note to Rule 608;  
16 Redd v. New York State Division of Parole, 923 F.Supp.2d 393,  
17 405 (E.D.N.Y. 2013); United States v. Nelson, 365 F.Supp.2d at  
18 389, n.3. Eng v. Scully, 146 F.R.D. 74, 78 (S.D.N.Y. 1993).  
19 Further guidance on this issue must await the plaintiff's  
20 proffer at trial. Obviously what I mean by that is that the  
21 plaintiff has suggested that, before examining the defendants  
22 with respect to specific instances of prior misconduct, the  
23 plaintiff would raise it with the court and assure that the  
24 prior instances go to the witness's truthfulness and doesn't  
25 violate any of the other restrictions under the use of such.

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1           5. The defendants seek to preclude any reference to  
2 the Patrol Guide because the Patrol Guide does not establish  
3 the requirements of what is required by the Constitution and  
4 thus would be unnecessarily confusing. However, the court sees  
5 no reason to deviate from what the court said in the Williams  
6 case. See Williams v. City of New York, 11-CV-5202, Dkt. No.  
7 47 at 44-45 (S.D.N.Y. July 3, 2012).

8           The Patrol Guide can be used to impeach the  
9 credibility of the individual defendants. If the defendants  
10 fail to act in the way that the Patrol Guide instructs and the  
11 way the defendants were presumably trained to act, then those  
12 facts could be taken into account by the jury in assessing the  
13 defendants' testimony about what they did. The court could  
14 give an appropriate limiting instruction to prevent any  
15 confusion. In particular, the court could make it clear that  
16 the Patrol Guide does not set out the standards for conduct  
17 required by the Constitution. The court welcomes an  
18 appropriate limiting instruction from the parties.

19           6. The defendants seek to remove the names of the  
20 individual defendants who are no longer defendants from the  
21 caption. The plaintiffs do not object to removing those  
22 defendants namely Baboolal, Cruz, and McGrath, and those  
23 defendants will therefore be removed.

24           With respect to the City, the defendants argue that  
25 the City would automatically be liable under respondeat

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1 superior if Officer Rivas is found liable for the state tort of  
2 malicious prosecution. The plaintiff responds that there still  
3 would have to be a finding that Officer Rivas was acting in  
4 furtherance of his duties as an employee and that the city was  
5 exercising some control over his activities. It is plain that  
6 if the City stipulates that if a verdict is returned against  
7 Officer Rivas for the state tort of malicious prosecution,  
8 judgment can be entered against the City for that amount, then  
9 there would no longer a reason for the City to be named as a  
10 defendant and could be removed from the caption and the verdict  
11 sheet. See Blake v. City of New York, No. 05-CV-95913, 2007  
12 U.S. District Lexis 95913, at \*5-\*6 (S.D.N.Y. July 13, 2007).  
13 Short of such a stipulation, however, the City needs to remain  
14 as a defendant with an appropriate instruction to the jury as  
15 to how the City can be liable under respondeat superior.

16 The court certainly invites the parties to discuss  
17 whether they wish to enter into an appropriate stipulation.  
18 The City, I believe, has entered such stipulations in at least  
19 one other case. Whether the City chooses to do that in this  
20 case is something for the parties to discuss.

21 MS. FUDIM: The City is prepared, your Honor, to make  
22 such a stipulation.

23 THE COURT: Plaintiff, the City would stipulate that  
24 if Officer Rivas is found liable for the state tort of  
25 malicious prosecution, judgment can be entered against the City

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1 for the damages found against Officer Rivas for the tort of  
2 malicious prosecution. That would mean that the City could be  
3 liable for that amount of money, even if for some reason there  
4 was qualified immunity for Officer Rivas, right?

5 Hold on.

6 MS. FUDIM: I understand. I am thinking about what  
7 you said.

8 You're saying that if there were qualified immunity  
9 for Officer Rivas on the state law malicious prosecution claim,  
10 that the City would still be liable under respondeat superior?

11 THE COURT: Respondeat superior, because qualified  
12 immunity is an individual defense for the officer, it is not a  
13 defense for the City, right?

14 MS. FUDIM: I haven't looked at that issue. I am not  
15 prepared to say something one way or the other right or wrong.

16 THE COURT: So you have to answer those questions  
17 before the City is simply taken out of the case, right?

18 MS. FUDIM: Well, I understand that when I discussed  
19 this matter prior to coming to court today --

20 THE COURT: I'm sorry. Have you discussed it with the  
21 plaintiff before today?

22 MS. FUDIM: No, I'm sorry, we discussed it internally  
23 at the City.

24 My understanding from conversations that I had with  
25 others at the City was that we are prepared to make that

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1 stipulation, but it was sort of an offhanded comment made to me  
2 and I did not participate in a conversation where we discussed  
3 qualified immunity in particular. But I was instructed that I  
4 could represent in court today that we stipulate to that.

5 THE COURT: What's the plaintiff's view?

6 MR. SANBORN: The plaintiff's view, your Honor, is  
7 that if there is an appropriate agreement by the City, that the  
8 City will be liable, if Officer Rivas is found to have  
9 subjected plaintiffs malicious prosecution under state law open  
10 and shut, that the City is liable, then of course we would  
11 stipulate to that.

12 THE COURT: I suggest that you at least consider the  
13 issue of qualified immunity. I mean, how could there be  
14 qualified immunity for malicious prosecution if the jury found  
15 that there was malicious prosecution. It requires a state of  
16 mind. The law has clearly established what questions would be  
17 left open to answer for a finding of qualified immunity, right?

18 MS. FUDIM: I think that is right. I think that is  
19 precisely. It is not an issue that I ever really thought  
20 about. It is not an issue that often comes up for precisely  
21 the reason that you just said.

22 THE COURT: Similarly, look, is the City intending  
23 that there was a qualified immunity defense to the claim of  
24 excessive force?

25 MS. FUDIM: I think that the City's claim, your Honor,

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1 is that there was no excessive force.

2 THE COURT: Right, I understand that. And whether  
3 there is qualified immunity is a legal question for the court.  
4 If there are any disputed issues of fact, the jury has to  
5 answer them in terms of special interrogatories, if you will.

6 The City should plainly think about whether there is  
7 really any viable defense of qualified immunity on either  
8 excessive force or malicious prosecution, and if there was,  
9 whether there are any questions of fact for the jury to answer  
10 in terms of interrogatories if they found there was excessive  
11 force or malicious prosecution.

12 Do you follow what I said?

13 MS. FUDIM: Yes.

14 THE COURT: It sounds like there's, pretty much,  
15 agreement that the parties will be entering into a stipulation  
16 subject to some further questions by the defendant that will  
17 take the City out of the case and make it clear that if the  
18 jury finds malicious prosecution and against Officer Rivas,  
19 that the City is liable for whatever damages the jury finds  
20 against Officer Rivas.

21 You all should talk about the stipulation and give me  
22 the stipulation by July 19 so that I can make sure that I  
23 remove the City from the caption and from my initial  
24 instructions to the jury and voir dire.

25 The City will have an answer to the third amended

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1 complaints by July 15, and the parties will submit an  
2 appropriate stipulation with respect to the City's liability on  
3 the malicious prosecution count by July 19.

4 Trial will begin on Monday, August 8, at nine a.m.  
5 Each side will have six hours for the examination of witnesses.  
6 You should get my trial rules, to the extent you haven't gotten  
7 them already.

8 Do you both have my trial rules?

9 MR. SANBORN: We do. I believe it was e-mailed to us.

10 THE COURT: Great. Thank you.

11 Generally, we will sit from 9:30 to 12:45 and from  
12 2:00 until 5:00. I discourage side bars. I am perfectly happy  
13 to come in early in the morning to talk to you at lunch, talk  
14 to you at the end of the day, to avoid using up the jury's  
15 time. I take faxes. If you know that there is going to be an  
16 evidentiary issue coming up, send me a fax or raise it with me  
17 before the jury comes in or at lunch or after the jury leaves.

18 In going over the joint pretrial order, I saw that  
19 there were a lot of exhibits that either had no star or had  
20 only a single asterisk. I urge you to talk to each other about  
21 those. There seem to me to be some obvious exhibits that you  
22 all ought to be able to double star.

23 I mean, the plaintiff's medical records, you surely  
24 don't need someone from the hospital to come in, do you?

25 MS. FUDIM: Well, at the time that we did the JPTO,

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1 your Honor, the plaintiff said he was going to be providing us  
2 with certified copies, because the copies that had previously  
3 been provided, none of them were certified copies, which is why  
4 we left it as it was when we filed the JPTO.

5 In the interim, counsel's provided certifications. I  
6 don't know if it was for all, but for several of them. So the  
7 ones that there are certifications on, there is not going to be  
8 an issue on.

9 I understand from plaintiff's counsel that they are  
10 going to be obtaining certifications on the other ones. I  
11 think that the issue will be moot, but at the time that we did  
12 that, there had never been any type of certification, which is  
13 why it was indicated as such.

14 THE COURT: I am glad to hear that you're working it  
15 out.

16 There is also the plaintiff wanted to admit the memo  
17 books relating to the date of the incident from several  
18 officers, and those are marked with a single asterisk. Why  
19 would the defendant be resisting the memo books? I assume that  
20 the officers would testify, if called, that they were business  
21 records.

22 It is particularly odd because the defendants want to  
23 introduce Officer Regan's memo book and the plaintiff agrees to  
24 admit it, and yet the defendant doesn't want to admit the memo  
25 books from the other officers. Is there some reason why the

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1 other officers have particularly unreliable memo books and  
2 Officer Regan's memo book is particularly good?

3 MS. FUDIM: No. I think, your Honor, that the basis  
4 for starring it was that the plaintiff has a date that is wrong  
5 in the description. He listed them as March 17, 2012, which is  
6 not the date of the incident. I believe that had to do with  
7 it. This portion of the JPTO and the starring is not something  
8 that I personally did. One of my colleagues did it, so I am  
9 trying to think back to what we had conversations about.

10 I think that that was part of it. I really can't  
11 speak to that because I didn't do this section of the JPTO.

12 THE COURT: I suggest you have a conversation with the  
13 plaintiff's counsel and try to work out the issues with respect  
14 to the exhibits, because there doesn't seem like there is a  
15 basis to waste the jury's time with disputes over some of these  
16 exhibits.

17 You all should get my jury rules. Did Mr. Fletcher  
18 e-mail those to you, too?

19 As you see, I use the struck panel. I intend to seat  
20 eight jurors for this case. Each side gets three peremptories,  
21 so you'll have 14 jurors for purposes of the voir dire, all  
22 seated in the box, seven and seven.

23 I'll be asking the jurors questions. If any of those  
24 questions deserve followup, I'll do the followup usually at the  
25 sidebar. You are all obviously welcome to come up to the

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1 sidebar and listen to the examination. I usually ask the juror  
2 to step back, and if either of you have any additional  
3 questions, then I'll ask the additional questions.

4 If, in the course of examining the juror, it appears  
5 that there is a challenge for cause, the juror will be excused.  
6 Another juror's name from the back will substitute for that  
7 juror. I'll ask if the juror has been listening to all the  
8 questions and is there any information to be brought to my  
9 attention. If not, we will just then continue.

10 If, in the course of the examination, either of you  
11 thinks that there is a challenge for cause, please bring it to  
12 my attention. If both of you agree on a challenge for cause, I  
13 will probably agree also, and it will expedite the process.  
14 The juror will simply be excused, another juror will be seated.

15 After the general questions to all of the jurors in  
16 the box, they'll answer individual questions which will be  
17 written out on questionnaires, and after all of the 14 jurors  
18 have answered the individual questions, we will then take a  
19 break and you all will have the opportunity, first of all, to  
20 tell me whether there are any other questions for the jurors  
21 and whether there are any challenges for cause. There really  
22 shouldn't be any challenges for cause at that point because you  
23 have been bringing them to my attention as we go along. If  
24 there are, you bring them to my attention, and I'll rule.

25 You then exercise your peremptories, three rounds.

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1 Each side exercises one peremptory in each round. Plaintiff  
2 defendant, plaintiff defendant, plaintiff defendant. You can  
3 exercise your peremptory challenges in any order that you like  
4 against any one of the 14 jurors. You don't have to exercise  
5 them numerically. You exercise against any of the 14.

6 The lowest number eight jurors will be your jury. So  
7 if either parties waives in any individual round, it would be  
8 the equivalent of excusing juror No. 14. If juror No. 14 is  
9 off and someone waives, it is the equivalent of excusing juror  
10 No. 13, because it will be the lowest eight numbered jurors who  
11 are your jury. If both sides, plaintiff and defendant, waive  
12 in any round, jury selection is over, and the lowest numbered  
13 eight will be your jury.

14 That's the way in which it will go. Any questions  
15 about jury selection?

16 MR. SANBORN: None from the plaintiff.

17 MS. FUDIM: No, your Honor.

18 THE COURT: Let me read you my description of the case  
19 for the jury to see if you all agree.

20 As I explained, this is a civil case. The case is a  
21 relatively short case. It is expected to last about one week.  
22 The plaintiff in this case, that is the party who brought the  
23 case, is Edmin Alicea. The defendants are the City of New  
24 York, Police Officer Alejandro Rivas, Police Officer Paul  
25 Arico, and Police Officer Brendan Regan.

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1                   The plaintiff, Mr. Alicea, alleges three causes of  
2 action arising out of his arrest and prosecution in 2012. He  
3 alleges that, in the course of arresting him, Police Officer  
4 Arico choked him, hit him, and restrained him with excessive,  
5 tight handcuffs, while Officers Rivas and Regan stood by. He  
6 also alleges that he was transported to the precinct in a  
7 manner designed to cause him pain and injuries. He also  
8 alleges that Officer Rivas made false statements in a criminal  
9 complaint that led to his prosecution.

10                  Mr. Alicea has brought three claims. He has sued  
11 Officers Arico, Rivas, and Regan, for allegedly using excessive  
12 force against him in violation of 42 U.S.C. Section 1983, a  
13 federal civil rights statute. He has also sued Officer Rivas  
14 for malicious prosecution in violation of Section 1983.  
15 Finally, he has sued Officer Rivas and the City of New York for  
16 malicious prosecution in violation of New York State law.

17                  The defendants have denied all of the plaintiff's  
18 claims and assert that they did nothing improper in connection  
19 with the plaintiff's arrest and prosecution.

20                  This is only a summary of the parties' contentions.  
21 Under the law, the facts are for the jury to determine and the  
22 law is for the court.

23                  Is that an acceptable description of the claims?

24                  MR. SANBORN: Your Honor, on the specific description  
25 of the use of force by Defendant Arico, one plaintiff is not

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1       alleging he was hit by Arico, he is alleging he was choked,  
2       handcuffs were placed on him in an excessively tight manner,  
3       and then the --

4           THE COURT: I said he alleges Police Officer Arico  
5       choked him, hit him, and restrained him with excessively tight  
6       handcuffs. You want me to drop hitting?

7           MR. SANBORN: Hit him, and after the restraining with  
8       the excessively tight handcuffs, and the real lynchpin, your  
9       Honor, of the fourth claim is the pulling of the handcuffs up  
10      to such a degree, what we would say to such a degree that  
11      caused him injury. I'm sure we don't want to be too  
12      argumentative here. That last action, which is really the  
13      lynchpin of the force claim, needs to be in that summary.

14           THE COURT: He choked him, restrained him with  
15       excessively tight handcuffs, and yanked the handcuffs up  
16       causing -- yanked him up by the handcuffs, injuring him, right?

17           MR. SANBORN: Yes.

18           THE COURT: He alleges that Officers Rivas and Regan  
19       stood by watching and failed to intervene, right?

20           MR. SANBORN: Yes.

21           THE COURT: He also alleges that he was transported to  
22       the precinct in a manner designed to cause him pain and  
23       injuries, right?

24           MR. SANBORN: Correct, your Honor.

25           THE COURT: Anything else?

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1                   MR. SANBORN: I apologize, your Honor. Did the  
2 description of the yanking, was it specific to only the scene  
3 of the arrest? As we discussed earlier, we do allege that it  
4 occurred a second time on the way inside the precinct. I  
5 wasn't sure if we encapsulated that in the summary. It is  
6 still, possibly the summary can use a multiple of the verb, the  
7 plural of the verb. I apologize.

8                   THE COURT: No. It's all right.

9                   Does he allege that it was yanked up twice?

10                  MR. SANBORN: He alleges multiple times. I believe  
11 his deposition testimony is that the actual instance of the  
12 yanking occurred twice before he was placed in the car, and  
13 then Defendant Arico performed a similar action on the way  
14 inside the precinct.

15                  THE COURT: So he alleges that Officer Arico yanked  
16 him up by the handcuffs, yanked him up by the handcuffs several  
17 times, thereby injuring him. He alleges that Officer Rivas and  
18 Regan stood by watching and failed to intervene on at least one  
19 occasion.

20                  MR. SANBORN: Our allegation is that Rivas and Regan  
21 were present for both instances.

22                  THE COURT: I just have to say he also alleges that  
23 Officers Rivas and Regan stood by watching and failed to  
24 intervene?

25                  MR. SANBORN: Yes, your Honor.

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1                   THE COURT: He also alleges he was transported to the  
2 precinct in a manner designed to cause him pain and injuries.

3                   MR. SANBORN: Nothing else for the plaintiff, your  
4 Honor.

5                   THE COURT: Defendant?

6                   MS. FUDIM: Just the reference, your Honor, to the  
7 City at the beginning of the portion you read.

8                   THE COURT: Yes, but I can't do anything until you  
9 give me a stip, but I'll put it in brackets just to remind me.  
10 He has sued Officer Rivas for malicious prosecution and  
11 violation of New York state Law. And, yes, I'll take out the  
12 other reference to the City as a defendant, if they're out.  
13 I'll put it in brackets now.

14                   MS. FUDIM: OK.

15                   THE COURT: The introduction to the parties, the  
16 plaintiff, Edwin Alicea, is represented by Mark Reibman.

17                   MR. REIBMAN: Your Honor, yes. It would be Reibman.

18                   THE COURT: Mark Reibman and James Sanborn of Reibman  
19 & Weiner. Please stand.

20                   MR. REIBMAN: He might not be present, but I think  
21 Weiner would be present.

22                   THE COURT: I'm sorry?

23                   MR. REIBMAN: He might not be here, but I think Weiner  
24 would be preferable than Weiner, if possible.

25                   THE COURT: Oh, sure. You tell me on the day of trial

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1 if you have anyone else sitting at counsel table you want me to  
2 introduce.

3 MR. REIBMAN: I understand.

4 THE COURT: The defendants are the City of New York,  
5 if they're still here, Police Officer Rivas, Police Officer  
6 Paul Arico, and Police Officer Brendan -- is it Regan?

7 MS. FUDIM: Regan.

8 THE COURT: Regan, not Reagan.

9 MS. FUDIM: Regan.

10 THE COURT: -- are represented by Zachary W. Carter,  
11 the Corporation Counsel of the City of New York, and Elissa P.  
12 Fudim and Barry Myrvold from the corporation counsel's office.

13 MS. FUDIM: Nobody would like to know more than me who  
14 my trial partner is going to be on this case, Judge.

15 THE COURT: I'm sorry?

16 MS. FUDIM: Nobody would like to know more than me who  
17 my trial partner is going to be on this case. As many times as  
18 I have asked, I am told I have to wait. It might be  
19 Mr. Myrvold, it might be someone else.

20 THE COURT: That's fine. But is that OK?

21 MS. FUDIM: Yes.

22 THE COURT: Elissa P. Fudim and whoever it is from the  
23 corporation counsel's office.

24 You don't want me to say assistant corporation counsel  
25 or senior corporation counsel?

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1 MS. FUDIM: Not necessary, no. It is Fudim, though,  
2 your Honor.

3 THE COURT: I'm sorry.

4 MS. FUDIM: It is pronounced Fudim.

5 THE COURT: Come again?

6 MS. FUDIM: Fudim, like you're feuding with somebody.

7 THE COURT: Oh, Fudim.

8 MS. FUDIM: I think you said Fudim. It is Fudim.

9 THE COURT: Fu like fuel. I'll try to remember that.

10 MS. FUDIM: It is OK if you don't. I am just telling  
11 you.

12 THE COURT: It's all right. Tell me at break if I am  
13 doing it wrong. I have enough experience with having your name  
14 mispronounced that I would like to pronounce names correctly.

15 Witnesses or parties whose names you may hear, do any  
16 of you know or have you had any dealings, personal business,  
17 with any of these people: Edwin Alicea, Lindsay Daniels, Zwi  
18 Wasserstein, Darren Jay Friedman, Richard Baboolal, Alejandro  
19 Rivas, Paul Arico, Brendan Regan, Terrence McGrath, Dr. Ramesh  
20 Gidumal.

21 Any other names they may hear?

22 MS. FUDIM: No, your Honor.

23 MR. SANBORN: No, your Honor.

24 THE COURT: Places. There may be testimony about  
25 events that occurred at what places would you like me to

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1 mention?

2 Plaintiff was arrested where?

3 MR. SANBORN: He was arrested outside 172nd and  
4 Broadway, so outside the building on that street.

5 THE COURT: Is there an address?

6 MR. SANBORN: Yes. Sorry, your Honor, there is. I do  
7 not have it in front of me, however.

8 THE COURT: You can give me the cross streets.

9 MR. SANBORN: The cross streets is Broadway and 172nd  
10 Street. The actual physical location was a little bit west on  
11 172nd Street, so the physical address is on 172nd.

12 THE COURT: It is enough for me to say there may be  
13 testimony about events that occurred around Broadway and West  
14 172nd Street, is there anything about that fact that would  
15 interfere with your ability to be fair and impartial.

16 The reason for the question is, obviously, if a person  
17 lives at Broadway and 172nd Street, they may have personal  
18 knowledge of this case, and probably it would be a question of  
19 whether they could sit as a juror.

20 Any other specific places?

21 MR. SANBORN: On that point, your Honor, it may make  
22 sense to include the surveillance zone, which is where  
23 defendants claim plaintiff purchased marijuana, which is 100  
24 West 172nd Street, this time between St. Nicholas and Audubon.

25 THE COURT: West 172nd street between St. Nicholas

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1 Avenue and Audubon Avenue.

2 Great. That completes my questions.

3 Do you all have anything else to raise with me?

4 MR. SANBORN: Nothing from the plaintiff at this time,  
5 your Honor.

6 MS. FUDIM: Just one thing, your Honor.

7 Since the time that we filed our proposed jury  
8 instructions and plaintiff has now withdrawn any claim for  
9 mental anguish on the malicious prosecution claims, we would  
10 want something in the jury instruction regarding that. There  
11 is nothing there now because that wasn't an issue at the time.

12 THE COURT: I'll make it clear in the description of  
13 damages that the plaintiff is not claiming any damages for  
14 emotional distress.

15 Anything else?

16 MS. FUDIM: That's all I have at this time, your  
17 Honor.

18 THE COURT: At the conclusion of a final pretrial  
19 conference, I usually raise with the parties the issue of  
20 settlement.

21 I raised it with you last time, didn't I?

22 MR. SANBORN: Yes, your Honor.

23 THE COURT: The parties told me this is a case that  
24 will not settle. There is very little point in my exhortations  
25 to you. I will tell you that you should talk about the

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1 possibility of settlement. The plaintiff should make a demand.  
2 Whether you settle is completely up to you.

3 I will see you at nine o'clock on August 8. The case  
4 will definitely go to trial on that date, so the time for  
5 litigation strategy, if ever there was time, is now over, and  
6 the case either settles or it doesn't. You should at least  
7 talk about it, because one of you will be right and one of you  
8 will be wrong. I always hate to see that.

9 The jury will tell us who was right and who was wrong,  
10 and whatever the discussions are between you all, whether it be  
11 the demand or the offer or the lack of offer, again, the jury  
12 will tell if who was right and who was wrong.

13 The only way that neither of you will be wrong is if  
14 the case actually settles, but that is up to you. I am here to  
15 try the case and I will put in the jury demand, and we will  
16 have the panel up here as close to probably 9:30 as we can. I  
17 want you all here at nine so that we can talk about whether  
18 there is anything else that has come up.

19 I will see you at nine o'clock on August, the 8th.  
20 Thank you.

21 (Adjourned)

22

23

24

25